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5 Attorney for Defendant Josef F. Boehm

6 IN THE UNITED STATES DISTRICT COURT
7 DISTRICT OF ALASKA

8
9 Sally C. Purser,)
10 Plaintiff,) DEFENDANT JOSEF BOEHM'S
11 v.) MEMORANDUM OF POINTS AND
12 Josef F. Boehm, Allen K.) AUTHORITIES IN SUPPORT OF MOTION
Bolling, and Bambi Tyree,) TO SET ASIDE PARTIAL SUMMARY
13 Defendants.) JUDGMENT ORDER
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CASE NO.: A05-0085 (JKS)

MEMORANDUM IN SUPPORT OF MOTION TO SET ASIDE PARTIAL SUMMARY
JUDGMENT ORDER (Fed.R.Civ.P. 6(b) (2))

The defense moves to set aside the Order granting partial summary judgment to Plaintiff. The defense relies on Fed.R.Civ.Pro. 6(b) (2).

1. Legal Standards

Fed.R.Civ.Pro. 6(b) (2) provides the court with discretion to enlarge the period of time for response even after the expiration of the normal time if the movant can show "excusable neglect" for failure to meet the original deadline. "Excusable neglect" is an equitable determination requiring consideration of "all relevant circumstances surrounding the party's omission." Pioneer Inv. Servs. Co. v. Brunswick Assoc. Ltd. Partnership, 507 U.S. 380, 395 (1993).

1 Generally, the court will consider several factors, including (1)
2 the danger of prejudice to the non-moving party, (2) the length of
3 delay and its potential impact on judicial proceedings, (3) the reason
4 for the delay, including whether it was within the reasonable control
5 of the movant, and (4) whether the moving party's conduct was in good
6 faith. 507 U.S. at 395; see also Comm. for Idaho's High Desert, Inc.
7 v. Yost, 92 F.3d 814, 825 (9th Cir. 1996) 2 Factual background.

8 The Law Offices of David Kenner substituted as counsel for
9 defendant Josef F. Boehm on May 24, 2006. At that time David Kenner
10 was a sole practitioner. It was anticipated he would immerse himself
11 in this matter as soon as he finished trial in USA v. Wakine, 04-
12 00373. That matter started trial on June 6, 2006 and finished on June
13 13, 2006.

14 The motion for partial summary judgment was filed on June 12, 2006.
15 A timely response would have been due on July 17, 2006. Mr. Kenner
16 suffered a serious accident on June 19, 2006. The injury, caused by
17 a fall, resulted in the need for emergency hip replacement surgery.
18 He remained under supervised medical care or otherwise limited to his
19 home until August 30, 2006. During September 2006, Mr. Kenner has
20 gradually returned to his office in a full time capacity.

21 During the months of June and July he attempted to insure
22 management of this case. He contacted undersigned counsel, Brett A.
23 Greenfield, on July 12, 2006. At that time Kenner was still very
24 limited as a result of his surgery and complications resulting
25 thereafter. Mr. Greenfield maintained a separate practice (Fisher &
26 Greenfield, A Partnership of Professional Law Corporations), but
27 agreed to assist. On July 12, 2006 Mr. Greenfield contacted Darryl

1 Jones, opposing counsel, and notified him of Kenner's medical issues.
2 Mr. Jones, agreed to stipulate to an extension of time to file the
3 response until August 2, 2006. He also agreed to file the notice of
4 stipulation for Greenfield as a matter of professional courtesy. The
5 stipulation was prepared and sent via email to Mr. Jones on July 14,
6 2006. Mr. Jones filed the stipulation after the response due date on
7 July 18, 2006.

8 Unfortunately, a formal request for an extension of time was not
9 made to accompany the stipulation. In the jurisdiction where
10 undersigned counsel regularly practices, stipulations of counsel for
11 minor extensions are routine. Mr. Greenfield expended significant
12 energy and resources responding to the motion for partial summary
13 judgment and the opposition was filed on August 1, 2006, a day before
14 the time anticipated by the stipulation.

15 During this time as Kenner's health continued to be a problem, he
16 sought to negate other problems by reaching an agreement to work with
17 Mr. Greenfield on a full time basis. An agreement was reached in early
18 August but necessitated a move to a new office with the attendant
19 problems of telephone and computer transfer and service, staff hires,
20 moving, etc. The move was complete by September 1, 2006. In addition,
21 during this time discovery in the form of 14 banker's boxes of
22 documentary evidence was received by prior counsel.
23

24 **2. Application of law to the current case**

25 Application of a totality of circumstances test including use of
26 the Pioneer factors shows that set aside and acceptance of the
27 opposition are appropriate. First, this case does not involve
28 prejudice to the opposing party because the substantive pleading was

1 filed within the time frame the opposing party had previously deemed
2 appropriate through stipulation. Second, the delay was not extensive
3 and not likely to have impact on other judicial proceedings. Third,
4 the reason for the delay did not involve conscious disregard of known
5 deadlines or a mistake of law readily attributable to counsel. Pincay,
6 supra.

7 Mr. Kenner was involved in a critical medical emergency beyond
8 his control. Despite his situation, he attempted to avoid harm to the
9 court or prejudice to the opposing party by seeking assistance of
10 attorney Brett Greenfield who took prompt action with regard to the
11 deadline. The delay was minimal and substantial energy and resources
12 were expended, including filing the substantive response prior to the
13 term anticipated in the stipulation. See CapstarCorp v. Pristine Ind.
14 Inc., 768 F.Supp. 518, 521-22 (W.D.N.C. 1991). The defense has
15 demonstrated a reasonable basis for non-compliance within the
16 originally specified time periods in Fed.R.Civ.P. 6.

17 The primary error was a failure to request permission from the
18 court to extend the deadline to the date anticipated in the
19 stipulation. The Court has recognized, however, that had such an
20 unopposed request been made an extension would have been likely. The
21 failure was not motivated by tactical or strategic considerations, and
22 is another indication that the moving party's conduct was in good
23 faith. Thus, the final Pioneer factor also weighs in favor of granting
24 the motion to set aside. See Pincay, 389 F.3d at 860-61 (Benzon, J.,
25 concurrence). This Court should therefore conclude in light of "all
26 relevant circumstances surrounding the party's omission" that the
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1 situation here warrants the equitable remedy of a finding of excusable
2 neglect under Rule 6(b) (2).

3 **3. Conclusion and Request for Relief**

4 For the reasons contained herein the Court should grant the
5 motion for set-aside of partial summary judgment, accept the late-
6 filed opposition to the motion for partial summary judgment, and allow
7 the case to proceed.

8 September 13, 2006

9 KENNER LAW FIRM, P.C.

10 By: 

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12 Brett A. Greenfield,
13 Attorney for Defendant Josef F. Boehm
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4
5 Attorney for Josef F. Boehm

6 IN THE UNITED STATES DISTRICT COURT DISTRICT OF ALASKA

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8 Salley C. Purser,) CASE NO.: A05-0085
9 Plaintiff,)
10 v.) CERTIFICATE OF SERVICE
11 Josef F. Boehm, Allen K.) DATE: September 15, 2006
Bolling, Leslie J. Williams, Jr.) TIME: 8:30 a.m.
12 and Bambi Tyree,)
13 Defendants.)
14

15 This is to Certify that on or about September 15, 2006 a true
16 and correct copy of the attached documents were caused to be mailed
17 to the following parties of record:

18

19 Bambi Tyree
Inmate No: 13016-006
20 FCI Dublin
5701 8th Street-Camp Parks
21 Dublin, CA 94568
C.M. No.: 7002 2410 0006 6742 2539

22 Allen K. Bolling
Inmate No: 14911-006
23 USP Terre Haute
U.S. Penitentiary
24 P.O. Box 12015
Terre Haute, IN 47801
C.M. 7002 2410 0006 6742 2188

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1 The following parties were served electronically on September 15,
2 2006:

3 **Darryl L. Jones**
4 lodj.federalnotices@yahoo.com

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6
7 KENNER LAW FIRM, P.C.
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9 By: 
10 David E. Kenner,
11 Attorney for Defendant
12 Josef Boehm
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